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ABSTRACT

Cases arguing about the use of school facilities by religious groups continued to increase in number in 1990; however cases involving home instruction and student searches declined. In the school desegregation section, the financing of desegregation plans occupied the attention in most cases. Increasingly, desegregation cases focus less on developing remedies and more on the question of which party pays for them. Cases are discussed under the following sections: (1) public school assignment, tuition, transportation, home instruction, and compulsory attendance; (2) private and parochial schools; (3) substantive rights of students, including search and seizure, and First Amendment religious and freedom of expression rights; (4) sanctions for student misconduct, including suspensions, expulsions, and corporal punishment; and (5) desegregation, including cross-district remedies, desegregation plan oversight, and state court cases. (MLF)

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PUPILS

Henry S. Lufler, Jr.

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INTRODUCTION

Cases arguing about the use of school facilities by religious groups continued to increase in number in 1990. A United States Supreme Court decision[1] affirming the use of a high school classroom by a Christian student group during an after-school activity period should help to direct future litigation in this area. While religious rights cases increased, cases involving home instruction and student searches, each the subject of much litigation in recent years, declined in number. In the school desegregation section of the chapter, perennially an area of lengthy arguments and much litigation, the financing of desegregation plans occupied the attention in most cases. Increasingly, desegregation cases focus less on developing remedies and more on the question of which party pays for them.

1. Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990).

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PUBLIC SCHOOL ASSIGNMENT, TUITION, and TRANSPORTATION

Tuition and Assignment

School districts sometimes argue that a child is domiciled outside the district and refuse to provide the student with an education without the payment of tuition. The problems inherent in such cases are exacerbated when neither of the districts involved feels that the child's education is its responsibility. In one such case, a New York school district sought to avoid paying tuition for students who resided with their parents until they were placed in a foster home in an adjoining district.[2] The district where the parents lived refused to accept a certification by the local social services department that the placement had occurred, arguing that it should have access to the children's confidential records maintained by the agency in order to contest the question. The appeals court disagreed and ruled that the certificate presented by the agency was adequate proof.

In another New York case, the parents of a teenage student sought to have the residency of their daughter transferred to an adjoining district where the student's aunt resided. The arrangement, however, was informal and was not accompanied by a change in legal guardianship. A lower state court ruled that the aunt's local school board had arbitrarily denied the student an education, and she continued to attend school there until she dropped out at age sixteen. The case continued in a federal district court when the student's parents sought damages from the district for the weeks of school missed by the student before the state court had acted. The federal court dismissed the damage claim and went on to rule that the state court had erroneously decided the residency question in the first place.[3] The court found that the student had suffered no loss of property rights because she was free to attend school where her parents resided and that parents may not unilaterally decide where residency for educational purposes occurs.

Two 1990 cases contained challenges to textbook rental fees assessed by school districts against families who claimed they were unable to pay and were eligible for a waiver. In the first, an Indiana school district unsuccessfully argued that it should be able to collect partial fees, even in the face of a state statute requiring full payment by the district for families meeting eligibility standards.[4] A Utah court also ruled in a similar case that a local school district could not have a waiver policy more restrictive than that promulgated by the state education board.[5] The local board had sought to restrict fee waivers only to those receiving public assistance.

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2. Three Village Cent. School Dist. v. Brentwood Union Free School Dist., 561 N.Y.S.2d 800 (App. Div. 1990).
3. Rogowski v. New Hartford Cent. School Dist., 730 F. Supp. 1202 (N.D.N.Y. 1990).
4. Gohn v. Akron School, 562 N.E.2d 1291 (Ind. Ct. App. 1990).
5. Lorenc v. Call, 789 P.2d 46 (Utah Ct. App. 1990).

Attorney fees also were awarded to the Utah plaintiff, who had raised constitutional claims that were not considered when the case was decided on state law grounds.

Iowa parents who challenged a multidistrict grade sharing plan saw their case dismissed when it was ruled that they lacked standing to bring the suit.[6] The Iowa court concluded that the parents' children were not "affected pupils," because none of them would be forced to change their current school attendance site as the result of the plan. Iowa law restricts appeals to those forced to change schools. The state law does not permit raising other assignment plan effects, such as its cost to parents, that were advanced by the plaintiffs as the justification for their opposition.

Home Instruction

No new legal issues were raised in 1990 home instruction cases, with courts relying on previous decisions to hold that states may regulate the home programs. In a Michigan case, an appeals court upheld the conviction of parents for violating compulsory attendance laws, rejecting a variety of constitutional and statutory challenges.[7] At the heart of their case, the plaintiffs claimed personal religious convictions as justification for their decision to educate their children at home. A state law, however, required those providing home instruction to have a teaching certificate. A previous state supreme court decision had allowed a lower court decision to stand that approved the certification requirement in the face of first amendment free exercise claims, the same set of facts presented in the current case.[8] Both Michigan courts reasoned that parents could select a certified home instruction teacher who espoused the religious perspectives they wanted, thereby negating the free-exercise claim.

In addition to declining to reverse on first amendment grounds, the Michigan appeals court in the current case also held that the certification requirement did not violate the fourteenth amendment right of parents to control their children's education. The court used a rational relationship test, concluding that the requirement served the legitimate state purpose of ensuring that all children received a basic education. The court also found that the school district did not have to comply with a state law regarding the closing of private schools when challenging a home instruction program and that there was sufficient evidence to sustain the original convictions.

In an earlier case just published, an Ohio appeals court sustained the conviction of parents for failing to comply with that state's attendance

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6. Brekke v. State Bd. of Educ., 449 N.W.2d 345 (Iowa 1989).
7. People v. De Jonge, 449 N.W.2d 899 (Mich. Ct. App. 1989).
8. Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 373 (Mich. 1986), *cert. denied*, 481 U.S. 1050 (1987).

laws.[9] The defendants in the case raised a long list of procedural objections. They failed to convince the appeals court, however, that they should have been afforded a jury trial, with the court concluding that the attendance law penalty was too low to make trial possible. The court also concluded that the local superintendent was not required to conduct a hearing to determine if the parents were "fit" to educate their children at home. The case had started with no-contest pleas to the original charges, and such issues only could be raised if the parents had pleaded not guilty.

An Idaho parent violated the terms of a court approved agreement regarding the home instruction of his children, and was held to be in contempt of court. The plaintiff had agreed to provide the school district with standardized test scores for his children, but after two test periods had refused to comply further. The plaintiff then sought a jury trial on the contempt charge and attempted to reopen all the issues that were the subject of the original consent decree. An appeals court held that the misdemeanor contempt charge did not require a jury trial and suggested that compliance with the original agreement was in the best interest of both the children and the state.[10]

Finally, Maine's highest court rejected an appeal filed by a home instruction father who claimed that his free exercise rights had been abridged when he was fined $200 for failing to send his daughter to school.[11] The court concluded that the defendant had failed to demonstrate any sincerely held religious views.

Compulsory Attendance

Courts generally hold that parents are responsible for causing their children to attend school, unless the child has become unruly and the parents have lost control. School districts may not, therefore, proceed against students using delinquency proceedings if it is their parents who are responsible for the nonattendance. In a case illustrating this point, a Minnesota appeals court held that a student could not be declared to be "habitually truant" when it was the parent who was responsible.[12] The court held that the label would unfairly stigmatize the student.

PRIVATE and PAROCHIAL SCHOOLS

Cases involving private and parochial schools generally concern issues arising from the contracts that parents sign with the schools, or challenges

9. State v. Levy, 563 N.E.2d 358 (Ohio Ct. App. 1988).
10. Bayes v. State, 785 P.2d 660 (Idaho Ct. App. 1989).
11. State v. Friel, 582 A.2d 252 (Me. 1990).
12. *In re* B.K.J., 451 N.W.2d 241 (Minn. Ct. App. 1990).

to the expulsion of students. In 1990 cases, however, two comparatively unusual matters were litigated: a challenge to a state law requiring private schools to supply basic student information to the state, and a claim that a private school was guilty of educational malpractice.

Challenges to state reporting requirements have traditionally originated when parents educating their children at home argue that their religious convictions preclude their cooperation with the state, even to the extent of providing basic information about the educational status of their children. Courts have upheld the reporting requirements for home instruction parents, concluding that a parent's modest loss of personal religious freedom when supplying information is outweighed by the state's compelling interest in ensuring that all children are receiving a basic education.[13] In a 1990 case, a Vermont private school with more than fifty students sought to avoid supplying the state with pupil names and other data.[14] The case commenced when one of the parents affiliated with the school was charged with violating the state's compulsory attendance law.

While nothing in the religious doctrine of the church running the school precluded supplying the information, testimony before a lower court had revealed that some of the parents were "suspicious" of the state's motives in collecting the data. On appeal from the lower court's misdemeanor conviction of the parent, the parents alleged that their free exercise rights were being abridged. The Vermont Supreme Court disagreed, holding that the reporting requirement constituted the least restrictive way that the state might exercise its obligation to monitor the educational progress of children. A variety of other state and federal constitutional claims and state statutory challenges raised by the defendants also were rejected.

Plaintiffs have prevailed with tort claims alleging that public schools failed to provide statutory educational requirements or, in the case of private schools, that specific courses promised in a contract were not taught. Courts, however, universally have rejected the opening of a new area of tort liability by accepting the concept of educational malpractice as the reason for a student's failure to learn. Nevertheless, a Kentucky private school was accused of malpractice in a case that originated when it refused to readmit a student for his junior year. The court was asked to find that the student's previous poor performance resulted from the school's failure to instruct him properly, or to compensate for his "attention deficit disorder." The suit also alleged that teacher comments that the student was "lazy" or had not "properly applied himself" constituted slander. None of these claims was supported by a state appeals court.[15] The court found that the school was not obligated to readmit the

13. *See* Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988) (home-school statute requiring submission of information to the state does not violate the free exercise clause).
14. State v. DeLaBruere, 577 A.2d 254 (Vt. 1990).
15. Rich v. Kentucky Country Day, Inc., 793 S.W.2d 832 (Ky. Ct. App. 1990).

student and that nothing in the contract between the school and the parent obligated the school to design a special educational program for him to ensure that he would obtain at least average grades. The court also held that comments made to the student about his performance were qualifiedly privileged and that no harm had befallen the student as the result of the statements.

A school operated by an Hasidic sect became the defendant in a case when the parents of six children who were expelled from the school challenged the action.[16] The expulsions occurred two months before the end of the school year and were brought about by the parents' expulsion from the congregation running the school. A school bylaw required all children in attendance to be the offspring of members and mandated the immediate withdrawal of those children whose parents leave the congregation. In spite of the fact that the bylaw is clear, six months passed before the school asked the students to withdraw. A state court ruled that it was arbitrary and capricious for the school to require them to leave just before the end of the school year, when placement alternatives would be difficult to find. The court also found the rabbi of the congregation to be in contempt of court for resisting the orders issued in the case.

A bitterly contested divorce case was central in a father's response to a lawsuit initiated by a private school to recover unpaid tuition owed for a child's education.[17] The case hinged on an oral contract made to the school by the father that he would pay the tuition. While the father later claimed the pledge was made under duress, the court rejected this claim, holding that the child had attended the school, and by accepting the service the father had accepted the responsibility to pay. The father's claim, that his promise to pay was conditioned on the fact that the check to the school would be co-endorsed by his former wife, was remanded for a lower court to consider.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

Cases arguing the propriety of school searches are controlled by the Supreme Court's decision in *New Jersey v. T.L.O.*[18] T.L.O. was a high school student who denied to school officials that she had been smoking in a rest-room. A search of her purse, however, revealed not only a pack of cigarettes, but also a quantity of marijuana and other evidence that she had been selling drugs at school. When the case reached it, the Court

16. Waldman v. United Talmudical Academy, 558 N.Y.S.2d 781 (Sup. Ct. 1990).
17. Bishop v. Westminster Schools, Inc., 397 S.E.2d 143 (Ga. Ct. App. 1990).
18. New Jersey v. T.L.O., 469 U.S. 325 (1985).

affirmed a "reasonableness" standard for school searches, rather than the probable cause standard required for searches in criminal cases, and held that the methods used to search a student should be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[19] Lower courts have used the decision to weigh fourth amendment challenges to school searches, finding in almost all of the cases that school officials acted appropriately.

In 1990 cases, courts considered a variety of searches that yielded evidence of drug sales and the possession of weapons, including sawed-off rifles and a machete. In several of these cases, criminal prosecution of the students resulted. In *T.L.O.*, the evidence gathered was used only in a school disciplinary proceeding. As in the cases that follow, lower courts have used the Court's *T.L.O.* holding regardless of the penalty that followed.

In the first of several 1990 drug cases, two students decided to purchase marijuana cigarettes from a third student whom they had heard was selling drugs. According to their account, they then intended to report the sale to the principal. After an exchange of money, but before receiving the marijuana, a teacher overheard an argument about the drug sale and reported the incident to the principal, who subsequently searched the plaintiff. The search yielded the money the students had paid and a cassette case filled with marijuana cigarettes.

When a criminal prosecution resulted, the plaintiff argued that the search was unreasonable and sought to distinguish the case from *T.L.O.* by arguing that the search resulted only from the uncorroborated accusation of another student and not as the result of observations made by school officials. A state appeals court disagreed, holding that the teacher's involvement in overhearing the drug-related argument was adequate information to permit the search of the student's jacket where the drugs were found.[20]

A search of a student's car and a locked briefcase was challenged in a Washington case.[21] Two student informants whose information had proved reliable in the past informed a principal that drugs were being sold in the school parking lot. When the defendant was called into the principal's office, he was asked to remove the contents of his pockets, which included $230 in small bills and a pager number. A subsequent search of the student's car revealed the pager, which was alleged to have been used to place drug orders, and a large quantity of marijuana. The appeals court affirmed the search process, holding that nothing in *T.L.O.* was intended to limit searches only to a student's immediate possessions,

19. *Id.* at 336.
20. Berry v. State, 561 N.E.2d 832 (Ind. Ct. App. 1990).
21. State v. Slattery, 787 P.2d 932 (Wash. Ct. App. 1990).

especially when the search of the student turned up evidence that additional contraband might be found in the car.

A student who was found wandering in a school corridor while classes were in session was stopped by a principal, who then observed that the student was clutching a book bag as if trying to conceal it. When the bag finally was opened in the principal's office, a .22 caliber pistol was found. After a misdemeanor conviction for carrying the weapon in school, the plaintiff questioned the reasonableness of the principal's search. An appeals court found no constitutional violation, holding that the principal's action was justified by his previous contacts with the student and the student's unusual behavior in trying to conceal the bag.[22]

In a Massachusetts gun case, two students told their teacher that another student had brought a gun to school to settle a dispute that occurred in the previous week. A search of the student's locker uncovered a sawed-off rifle and a bullet. After his conviction by a judge, the defendant sought a retrial on the ground that the search of the locker was unreasonable. Massachusetts' highest court ruled otherwise, holding the search was reasonable, given the information that school officials had received.[23] The court went on to add that probable cause to conduct the search also seemed to be present.

A playground disorder led to a police search when a principal was told that students were carrying weapons to use in a gang-related fight. The search of a student revealed that he was carrying a machete inside a trouser leg. When the student was placed under court supervision, a challenge to the search resulted. The court concluded that the search not only was reasonable, but was "constitutionally compelled."[24] The court reasoned that the tip given to the principal that a gang fight was imminent required him to take the action involving the police.

First Amendment Religious Rights

Conflicting federal courts of appeal decisions regarding the applicability of the Federal Equal Access Act[25] to student religious clubs was resolved by the Supreme Court in 1990. The Act requires public secondary schools that receive federal funds and that maintain a "limited open forum" for student activity groups to provide the access without regard to the content of speech at the meetings of a group. A 1989 Ninth Circuit Court of Appeals decision[26] held, notwithstanding the Act, that a student group wanting

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22. Williams v. State, 782 S.W.2d 251 (Tex. Ct. App. 1989).
23. Commonwealth v. Carey, 554 N.E.2d 1199 (Mass. 1990).
24. *In re* Alexander B., 270 Cal. Rptr. 342 (Ct. App. 1990).
25. 20 U.S.C.A. §§ 4071 *et seq.* (West 1985).
26. Garnett v. Renton School Dist. No. 403, 865 F.2d 1121 (9th Cir. 1989), *superseded*, 874 F.2d 608 (9th Cir. 1989) (use of a public school classroom for before school prayer would advance religion and would foster government entanglement with religion).

to use a classroom for before school prayer meetings could not do so without violating the "test" established by the Court in *Lemon v. Kurtzman*[27] for considering establishment law violations.

In another 1989 case, the Eighth Circuit Court of Appeals considered an Access Act challenge and reached the conclusion that a high school that had allowed such noncurricular student groups as a scuba club and two groups affiliated with Rotary International to meet after school could not deny a Bible club the same opportunity.[28] The Supreme Court upheld the Eighth Circuit decision.[29] Writing for the majority, Justice O'Connor noted that the Access Act did not define the critical term "noncurriculum related student group," but concluded in light of legislative history that Congress had intended to provide a low threshold for triggering the requirements of the Act.[30] Looking at the thirty clubs in existence at the school in question, the Court majority found that several of them clearly were not directly related to the curriculum and that equal access for the Bible group had therefore not been provided in a school where a limited open forum clearly existed. Having decided the case on statutory grounds, the majority declined to comment on the respondent's free speech and free exercise claims.

Four of the justices also concluded that the Act as applied to the facts of the case in question did not violate the establishment clause. Using *Lemon*, they found that the Act had a secular purpose, did not have the primary effect of advancing religion, and did not lead to the school's entanglement with religion. In the only dissent to the central holding in the case, Justice Stevens concluded that the Act should be read as recognizing "a much narrower forum than the Court has legislated into existence today."[31]

The use of mobile classrooms parked on parochial school grounds to provide remedial educational services under chapter 1[32] continued to be litigated after it was determined in 1988 that taxpayers have standing to bring the suit.[33] On remand from the Eighth Circuit, the district court heard a series of establishment clause challenges brought against the methods used to provide the chapter 1 services in Missouri. The plaintiffs in the case argued that the state's use of an "off-the-top" funding formula to pay for the educational services provided to parochial school students and the use of the trailers both were contrary to the Supreme Court's holding

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27. Lemon v. Kurtzman, 403 U.S. 602 (1971).
28. Mergens v. Board of Educ. of Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989); *see* The Yearbook of Education Law 1990 at 74.
29. Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990).
30. *Id.* at 2366.
31. *Id.* at 2383.
32. The Education Consol. and Improvement Act of 1981, 20 U.S.C. §§ 3801-8 (1982 and supp. III, 1985).
33. Pulido v. Bennett, 860 F.2d 296 (8th Cir. 1988); *see* The Yearbook of Education Law 1989 at 73.

in *Aguilar v. Felton*.[34] The plaintiff's argument on the funding approach used by the state was buttressed by data showing that it cost substantially more per pupil to provide the chapter 1 services to private school students.

The district court characterized its task as having to determine if the difference was "so grossly disproportionate" as to confer "a direct benefit" on the private schools.[35] The court concluded that the direct effect of the state policy bypassing public schools to give the funds directly to parochial schools was *de minimus*. But the spending of significantly more money on parochial school students was found to violate the establishment clause. The court also drew what it acknowledged were "fine lines," holding that portable classrooms could be parked on public streets, but not on the grounds of the parochial schools. Partial attorney fees were awarded to the plaintiffs.

A private school in California funded in part by chapter 1 also was the subject of an establishment clause challenge.[36] The school, a residential home for pregnant, unwed, teenage girls, was run by a nonprofit corporation that was affiliated with a Catholic order. The school, however, was found by the court to be entirely secular, having no religious affiliation entrance requirements and a curriculum without religious teachings of any sort. The court therefore rejected the plaintiff's arguments, also holding that the provision of educational supplies to the private school students did not violate the test in *Lemon*. The computers that were a part of the assistance were "locked" so that they could accept only prescreened secular software.

The provision of religious classes within public schools and on school grounds was challenged in two district court cases; both programs were found to violate the establishment clause. A Virginia court invalidated a program of religious instruction that was provided in buses parked at the curb outside the front door of an elementary school.[37] The buses were like those that the school used, but were owned by a religious group, which also was permitted by school administrators to enter classrooms to hand out enrollment cards to students. Students received bags of candy if all those in a classroom signed up for the religious program. The court issued a restraining order to stop the program.

Bible classes held during the school day and in school classrooms were found to violate the establishment clause by an Arkansas court.[38] *McCollum v. Board of Education*[39] invalidated precisely the same sort of program,

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34. Aguilar v. Felton, 473 U.S. 402 (1985) (federal funds cannot be used to pay public school teachers who provide instruction on private school premises without violating the establishment clause).
35. Pulido v. Cavazos, 728 F. Supp. 574, 585 (W.D. Mo. 1989).
36. Walker v. San Francisco Unified School Dist., 741 F. Supp. 1386 (N.D. Cal. 1990).
37. Doe v. Shenandoah County School Bd., 737 F. Supp. 913 (W.D. Va. 1990).
38. Doe v. Human, 725 F. Supp. 1503 (W.D. Ark. 1989).
39. McCollum v. Board of Educ., 333 U.S. 203 (1948).

with the Court holding that religious instruction during the school day aided religion because students were released from their legal obligation to attend school in order to take part in the program. Attempts by the defendants in the current case to argue that the Bible class was secular in nature were unsuccessful. The challenged instruction had been offered in the system for over fifty years.

Challenges to religious invocations and benedictions at high school commencement exercises continued, with the three cases to be discussed in this year's chapter all concluding that the practice violated the establishment clause. A Rhode Island district court rejected arguments that *Marsh v. Chambers*[40] was controlling at a high school commencement, holding that "the special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice."[41] The First Circuit upheld the decision a few months later, holding that the invoking of a deity in the benediction violated the establishment clause.[42] In dissent, one of the judges hearing the case argued that a system of rotating those presenting the invocations to ensure that a wide range of religious and ethical beliefs were represented would not run afoul of the first amendment.

In a less traditional graduation prayer case, parents and a minister who had previously delivered invocations attempted to force a school board to have prayers at commencement, arguing that their free speech and free exercise rights would be violated by their exclusion.[43] The school board had omitted the traditional prayers after they were informed by their insurance carrier that the board members might be held personally liable for damages if they allowed them, as federal case law in the state held that such prayers violated the establishment clause. The district court rejected the free speech claim, holding that the commencement ceremony was not a "public forum" and that its content was totally under the control of the school system. Plaintiffs also failed to convince the court that their right to the free exercise of their religion had been abridged, since there had been no showing that graduation prayer was an integral part of any organized religion.

Litigation attacking an Illinois statute requiring all elementary school children to recite the Pledge of Allegiance continued in 1990. The case was filed by atheists who object to the words "under God" contained in the pledge. The district court in a 1990 decision rejected the defendant school district's attempts to have the case dismissed.[44] While it was agreed

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40. Marsh v. Chambers, 463 U.S. 783 (1983) (prayers before the opening of a legislative session are "embedded in the history and tradition of this country" and do not violate the establishment clause).
41. Weisman v. Lee, 728 F. Supp. 68, 73 (D.R.I. 1990).
42. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).
43. Lundberg v. West Monona Community School Dist., 731 F. Supp. 331 (N.D. Iowa 1989).
44. Sherman v. Community Consol. School Dist. 21, 745 F. Supp. 1371 (N.D. Ill. 1990).

that the plaintiff's child had not been forced to recite the pledge, and that a state court might later rule that the statute was nonmandatory, the district court concluded that the question of whether a school led pledge resulted in unconstitutional coercion still had to be addressed. To leave this issue to a state court in subsequent litigation would, the court reasoned, merely delay an already lengthy proceeding.

A ten-by-twelve foot painting of the crucifixion of Jesus that had hung for over twenty years in a high school auditorium became the subject of a lawsuit when a student's parents saw it and later sought its removal. Various attempts by the school to claim that the work was not religious in nature, representing the secular theme of "man's inhumanity to man," were unsuccessful. A district court concluded that an "average observer" would find that the painting had a religious theme and that its presence in the school therefore violated the second prong of the *Lemon* test by conveying a message of governmental endorsement of religion.[45]

New York's highest court heard a challenge to that state's mandatory AIDS education curriculum. Lower courts had held that the requirement directing the inclusion of material about AIDS in health education courses, starting in kindergarten, did not violate the plaintiff's religious rights. The New York Court of Appeals concluded that the state had not made a sufficient showing for a summary judgment and remanded the case in order to give plaintiffs the opportunity to meet the "high threshold of proof" required to prove that their religious rights were violated by the curriculum.[46] The plaintiffs, members of a strict religious community, practice "spiritual separatism," by which they seek to distance themselves from all things they consider evil. While they send their children to public schools, they otherwise lead isolated lives and argued that the community's lack of contact with the larger society obviated the need for the curriculum. The state countered with a compelling interest argument centered around the fact that children might some day leave the religious community. The case was remanded for a consideration of these two conflicting points of view.

A Minnesota law permits public high school juniors and seniors to take a limited number of courses at two- and four-year colleges, some of which are religiously affiliated. The statute was attacked by a teachers' union, and the case initially centered on the union's standing to bring the suit. The Eighth Circuit Court of Appeals settled the threshold issue by ruling that the union lacked standing, but that the president of the union individually had standing as a taxpayer.[47] Upon remand, the district court then considered the first amendment challenge to the plan, which deducted

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45. Joki v. Board of Educ. of Schuylerville, 745 F. Supp. 823 (N.D.N.Y. 1990).
46. Ware v. Valley Stream High School Dist., 545 N.Y.S.2d 316 (App. Div. 1989), *aff'd as modified*, 550 N.E.2d 420 (N.Y. 1990).
47. Minnesota Fed'n of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989).

a portion of state shared revenue from the student's district and gave it to the college.[48] A Bible college having withdrawn from the program, the court then gathered extensive information about the remaining eight schools, finding that seven of them had religious traditions and affiliations but that they were not "pervasively sectarian." As to the remaining school, the court decided that more information was needed, precluding summary judgment.

A New Hampshire school district awarded an annual scholarship to a "worthy protestant boy" until it decided in 1987 that it should seek to change the discriminatory terms of the trust providing the funds to prevent the district's involvement in an equal protection violation. The district sought to substitute the term "worthy student." The New Hampshire Supreme Court ruled that the administration of the trust by the district constituted state action and that a lower court could not substitute a private party for the school system so that the original wording of the trust could continue.[49] The court reasoned, in the absence of any information to the contrary, that the scholarship donor had intended to aid a student at the school as a first priority, rather than having the principal purpose of seeking to support a protestant male.

First Amendment Freedom of Expression

Hazelwood School District v. Kuhlmeier[50] began when a principal deleted two pages of a high school newspaper that contained stories about student pregnancy and drug use. The paper, which was produced as part of a journalism class, was published with two blank pages. In upholding the principal's action, the Supreme Court held that the paper was not a forum for public expression and concluded that "educators do not offend the first amendment by exercising editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[51]

Subsequent expression cases have been heavily influenced by the Court's decision in *Hazelwood*. In a New York case, however, a district court declined "to read the decision with the breadth its dictum invites."[52] Following his discharge as the faculty supervisor of his school's newspaper, the teacher argued that his removal violated his first and fourteenth amendment rights. The teacher's discharge followed the publishing of a student editorial opposing a federal holiday in memory of Martin Luther King, Jr. The school system argued that *Hazelwood* gave them broad

48. Minnesota Fed'n of Teachers v. Nelson, 740 F. Supp. 694 (D. Minn. 1990).
49. *In re* Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990).
50. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
51. *Id.* at 273.
52. Romano v. Harrington, 725 F. Supp. 687, 689 (E.D.N.Y. 1989).

latitude to regulate the content of the school sponsored newspaper. The district court refused to grant summary judgment to the defendants, holding that it was unclear whether the masthead of the school paper, which stated that the content of the paper did not reflect the views of the school, was in force at the time of the firing. In *Hazelwood*, the Court had observed that the school newspaper in the case carried the "imprimatur of the school."

A student who was denied the opportunity to run for student council president filed suit arguing that his substantive due process rights had been violated.[53] Under the election system used by the school, two-thirds of a candidate's teachers must sign a statement attesting that the candidate had demonstrated appropriate behavior and attitudes in school. When the plaintiff, who admitted he had been "outspoken" at school, failed to generate the necessary signatures, the lawsuit resulted. The court held that students did not have a constitutional right to run for student council office and that the actions of the teachers in not approving his candidacy were related to "legitimate pedagogical concerns," as enumerated in *Hazelwood*.

A suit seeking damages was filed after school officials rejected the contents of a valedictory speech which a student had planned to give at commencement exercises. The parties agreed to have the case heard by a magistrate, with appeal to the Fifth Circuit Court of Appeals. The magistrate held that the school could reject the speech, which was wholly religious in nature. On appeal, the Fifth Circuit upheld the magistrate, declining to reach the constitutional issues presented, holding instead that the suit was moot because the school officials held qualified immunity and that the plaintiff could not recover damages.[54]

A school newspaper story alleging that a teacher was "a babbler" and "the worst teacher" at his school resulted in a suit against a school district and the paper's advisor, with the faculty member referred to in the story claiming that he had been defamed and had suffered emotional distress. A California state court held that the statements were not actionable.[55] The court found that the statements represented exaggerated expressions of the student writer's feelings about the teacher, but that a reader would not necessarily conclude that they were statements of fact.

SANCTIONS for STUDENT MISCONDUCT

Two 1990 cases weighed the appropriateness of penalties used against students. The first was an appeal of a 1988 decision which held that an unwed mother could be dismissed from the National Honor Society (NHS)

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53. Bull v. Dardanelle Pub. School Dist. No. 15, 745 F. Supp. 1455 (E.D. Ark. 1990).
54. Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990).
55. Moyer v. Amador Valley Joint Union High School Dist., 275 Cal. Rptr. 494 (Ct. App. 1990).

for violating the requirements of leadership and character.[56] The student alleged that her rights under title IX and 42 U.S.C. sections 1983 and 1985 had been violated because unwed fathers had not been similarly dismissed. The district court disagreed, holding that the school district had acted because the student had engaged in premarital sex, rather than because she was a mother.

On appeal, the Third District remanded the case to allow the lower court to hear additional testimony.[57] The district court had refused to admit testimony from a male student who was prepared to say that he had impregnated his girlfriend, whom he subsequently married, without being dismissed from the NHS. The student also intended to testify that he had told teachers at the school about his behavior. In addition to calling for the male student to testify, the appeals court expressed its view that title IX permitted the assignment of damages, an issue on which the Supreme Court has never ruled. Other federal courts of appeal have held that compensatory damages are not recoverable under title IX.

A Minnesota student filed suit when she was punished for violating a school rule prohibiting students from attending parties where alcoholic beverages were served.[58] It was not disputed that the plaintiff had been present at the party, but the student claimed that the rule violated her right to associate freely with her peers. As punishment for attending the party, the student lost the opportunity to participate in several swim meets and was required to return a previously won athletic letter awarded for her participation on the softball team.

The Minnesota District Court devoted most of its attention to the claim that the student had lost a constitutionally protected right to free association, a concept not fully developed in previous education decisions. To address the claim, the district court turned to decisions originating outside the educational setting. In a 1984 case, the Supreme Court developed the concept that relationships could be distributed on a continuum, ranging from those involving family members to those of a commercial nature.[59] The regulation of association, the Court held, required a careful examination of the relationship being regulated, with the most scrutiny being required for regulations applying to the most personal relationships. Applying this analysis to the case at hand, the district court found that high school social events were not a form of intimate association entitled to constitutional protection.[60] The court also held that the rule was rationally

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56. Pfeiffer v. Marion Center Area School Dist., 700 F. Supp 269 (W.D. Pa. 1988); *see* The Yearbook of Education Law 1989 at 79-80.
57. Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3d Cir. 1990).
58. Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990).
59. Roberts v. United States Jaycees, 468 U.S. 609 (1984) (ending discrimination against women constituted a compelling state interest justifying state action to end a male only membership requirement).
60. *See also* City of Dallas v. Stanglin, 490 U.S. 19 (1989) (ordinance limiting the use of dance halls to persons age fourteen to eighteen did not infringe on a constitutional right of association).

related to the school's legitimate desire to reduce peer pressure as a reason for student alcohol consumption.

Recovery of attorney fees and costs was argued in a case originating in a boarding school operated by the Federal Bureau of Indian Affairs. When a variety of disciplinary actions, including the handcuffing of a student to a fence, resulted in a lawsuit, a district court appointed a special master to resolve the issues presented. The master settled the case by recommending a variety of new discipline policies and procedures to be followed at the school. The master's fee award recommendation, however, was contested by the government, which sought to claim that the teachers responsible for the actions against the students were acting outside their official capacities. The Ninth Circuit Court of Appeals disagreed, holding that the students were the prevailing party, and that the teacher's actions were not so egregious as to require that they be sued as individuals in order for the students to recover fees and costs.[61]

Suspensions and Expulsions

Several 1990 state court decisions discussed the adequacy of the procedures followed by school districts prior to the expulsion of students. In the first case, a student who had threatened a teacher and his principal, and had violated other school rules, was expelled by a school board. The expulsion was challenged and damages were sought by the student's father. A state appeals court ruled that a lower court had erred by considering testimony in the case beyond that contained in school board minutes. The decision by the appeals court in turn was overruled by the Illinois Supreme Court, and the expulsion was upheld.[62] The Illinois high court concluded that the presence of a constitutional claim for damages under 42 U.S.C. section 1983 made the case more than a review of an administrative decision. An administrative decision to expel a student required only a review of the official record, but once the constitutional violation was alleged, the lower court had the obligation to hear evidence beyond the board's official minutes.

A Missouri student who brought a knife to school was suspended for ten days. The ten-day penalty was assessed by the student's principal in recognition of the student's excellent school record and the fact that the knife had not been used. A lawsuit was filed when the suspension was extended by the school superintendent and school board to cover the rest of the semester. A lower court ruled that the extended penalty was arbitrary, and the school district appealed. An appeals court reversed, holding that

61. Ramon v. Soto, 916 F.2d 1377 (9th Cir. 1989).
62. Stratton v. Wenona Community Unit Dist. No. 1, 526 N.E.2d 201 (Ill. App. Ct. 1988), *rev'd*, 551 N.E.2d 640 (Ill. 1990).

the board's standard policy of lengthy suspensions for the possession of weapons was not unreasonable.[63]

A school district sought to appeal a case it had lost when a lower court ruled that a student should not be placed in an "alternative school" for students with disciplinary problems as the result of skipping classes. An appeals court declined to hear the case because the student already had graduated and identical cases were unlikely to occur in the future.[64]

Corporal Punishment

Corporal punishment cases that involve the use of force considered by plaintiffs to be excessive lead to claims that a student's substantive due process rights had been violated. In reviewing these substantive due process claims, courts rely on a number of circuit court decisions. It must be determined, for example, "whether the punishment was administered in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm."[65] Few corporal punishment cases have resulted in a finding that a student's substantive due process rights were violated, though many of the cases are settled and disappear from the record once courts decline to grant summary judgment to defending school systems.

A middle school band student playing the clarinet who was hit on the head by his teacher filed suit alleging a substantive due process violation.[66] When asked during his deposition why he hit the student, the teacher did not have an answer, though portions of his testimony reported that the student had failed to puff his cheeks properly while playing. Given the fact that the district court could not determine why any punishment was administered, the defendant's motion for summary judgment was denied and the case was continued.

A Wisconsin district court considered a case involving a mathematics teacher who threw a student into a blackboard.[67] While the plaintiff sought to have the case considered as one not involving corporal punishment, the court ruled otherwise, holding that the student had been asked to remain after class and that the altercation had occurred as the result of perceived classroom misbehavior. The court then looked at the teacher's actions, concluding that it lacked sufficient information to decide if the teacher had acted without malice. Because a decision on the question of the teacher's

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63. Consolidated School Dist. No. 2 v. King, 786 S.W.2d 217 (Mo. Ct. App. 1990).
64. Payne v. J.T.N., 568 So. 2d 830 (Ala. Civ. App. 1990).
65. Wise v. Pea Ridge School Dist., 855 F.2d 560, 564 (8th Cir. 1988); *see also* Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (corporal punishment when "literally shocking to the conscience" may be a substantive due process violation).
66. Meyer v. Litwiller, 749 F. Supp. 981 (W.D. Mo. 1990).
67. Thrasher v. General Casualty Co. of Wis., 732 F. Supp. 966 (W.D. Wis. 1990).

motives involved weighing the credibility of testimony given by the parties, the court refused to grant summary judgment. The school district and several administrators were, however, dismissed as parties in the case.

DESEGREGATION

New cases were recorded in a number of long-standing desegregation disputes. The Supreme Court addressed the question of the power of district courts to order the funding of desegregation remedies, addressing the question of whether courts have the power to order property tax increases in spite of a state mandated increase limit. In cases involving the unitary status of school districts, considerable differences among courts regarding the standards to be used continued to be recorded.

Cross-district Remedies

The cost of desegregation remedies and the division of responsibility for paying were at the heart of almost all the 1990 cross-district remedy cases. The Supreme Court entered the lengthy dispute over who should pay for desegregation in Kansas City, Missouri, ruling that a district court attempt to impose a property tax increase violated the principles of federal/state comity.[68] The district court had ordered the tax increase after concluding that the provisions of state law that required a two-thirds voter approval precluded a favorable referendum outcome.[69] The Eighth Circuit Court of Appeals upheld the one-time levy increase set by the court, but held that future increases must be set by the local government body with state authorities enjoined from using state laws to prevent their collection.[70] The Supreme Court decision affirmed the second part of the court of appeals decision.

While the Court was unanimous in holding that district courts could not set specific property tax levies to enforce desegregation orders, only five justices agreed that courts could order a local government body to raise taxes as a desegregation remedy. The majority opinion did not address the scope of the remedy the district court had ordered, stating that it had granted *certiorari* only to hear the tax question. Citing *Milliken v. Bradley*,[71] the Court held that state laws could be set aside in order for local governments to pay their share of remedying a constitutional

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68. Missouri v. Jenkins, 110 S. Ct. 1651 (1990).
69. Jenkins v. Missouri, 672 F. Supp 400 (W.D. Mo. 1987); for a discussion of this and other Kansas City cases, *see* The Yearbook of Education Law 1989 at 87-8.
70. Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988).
71. Milliken v. Bradley, 443 U.S. 267 (1977).

violation. To rule otherwise, the Court reasoned, would fail to take into account the obligations of local governments under the supremacy clause to fulfill constitutional duties.

In dissent, four justices argued that the setting of taxes was not a judicial function. They began, however, by assailing the scope of the remedy ordered by the district court, arguing that the plaintiffs and the Kansas City board were adversaries in name only. Both groups, the dissent suggested, were trying to make the entire Kansas City district a magnet, so that suburban majority group students would attend. In pursuit of this goal, no cost controls had been exercised in the development of remedies costing in excess of $450 million. This led the dissenting opinion to characterize the remedial order as "unlike any before seen."[72] The minority concluded that were it to consider "judicial taxation" to remedy a constitutional violation, enforcement of the remedy ordered in the case at hand would not be the one where such a step would be taken.

Another Eighth Circuit case involving Kansas City also was recorded in 1990. Addressing the involvement by suburban school districts in the highly polarized litigation, the decision consolidated several cases and ordered the district court to develop a voluntary interdistrict transfer plan.[73] The state and suburban districts had agreed on a plan in 1985, but the failure of the state to meet its funding promises was used by the suburban districts as justification for not starting it. The appeals court ordered lower court jurisdiction over the plan to ensure that the impasse was broken.

The financial obligation incurred by the state of California when it signed a consent decree designed to desegregate San Francisco schools was argued before the Ninth Circuit Court of Appeals. By agreeing to the decree in 1983, the state assumed responsibility for funding the plan. In 1985, however, a state law was passed limiting state reimbursement in desegregation cases to no more than 80%. A federal district court held that the state must stick with its agreement, but the Ninth Circuit disagreed.[74] The appeals court found that nothing in the agreement spoke to the possibility that the state funding formula might be changed. In fact, portions of the decree could be read as offering less than unqualified guarantees of funding. Looking at other litigation concerning consent decrees, the Ninth Circuit found that it was bound strictly by the decree's express language. While the decree in question was not sufficiently clear to cause the appeals court to order the full payment, it did suggest a loophole, observing that the lower court still had the power to modify the decree.

The state of Arkansas agreed to a financial settlement with the other

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72. 110 S. Ct. 1651, 1676.
73. Jenkins v. Missouri, 900 F.2d 1174, *modified*, 904 F.2d 415 (8th Cir. 1990).
74. San Francisco NAACP v. San Francisco Unified School Dist., 695 F. Supp. 1033 (N.D. Cal. 1988), *rev'd*, 896 F.2d 412 (9th Cir. 1990).

parties in the Little Rock school desegregation case, even though there was no agreed upon plan on which to spend the funds. The cash settlement was affirmed by the district court, but not the portion of the agreement that attempted to limit the remedies that might be suggested by the special master appointed by the court.[75] The court scolded the parties for their lack of commitment to implementing a plan, ordering the entire payment to be used to fund desegregation and suggesting that even the counsel for minority students seemed to have agreed that some funds might be used for other purposes. The court therefore ordered that the state funds be placed in an escrow account. It also assailed the school district for the "blatant disregard" of prior court orders in the case, indicating that it was contemplating what further action to take.[76]

The Little Rock court rejected the attorney fees proposed in the settlement agreement. The court observed that the Little Rock district was the principal prevailing party, but had agreed to pay the bulk of the fees, thereby reducing the amount available to fund the desegregation plan. Furthermore, the court questioned the method of fee calculation, finding that some of them were being assessed for litigation "terminated decades in the past."

Litigation concerning desegregation in St. Louis continued in 1990, with courts resorting to a case numbering system in order to keep track of the numerous published decisions. In its latest decision in the case, the Eighth Circuit Court of Appeals upheld a court order establishing a comprehensive plan for St. Louis magnet schools.[77] The assignment of responsibility to pay for the capital costs associated with the plan were central to the board's appeal. The state share of the magnet plan costs was 20% higher than it was paying to fund district-wide remedies, so the board sought to have magnet plan capital costs shifted to the higher category. The appeals court agreed with the district court that the board could not now raise the funding issue, since it had not appealed earlier when the magnet plan costs were listed with the others. The school district also failed in its attempt to secure more than one-time funding for magnet school capital improvements.

The district court in the St. Louis case also considered the continuing question of how to desegregate secondary level vocational education schools.[78] Two existing vocational systems, one operated by the public schools and the other by a special school district, were castigated by the court, which indicated its "profound lack of confidence" in the boards running each of them. The court therefore ordered a "choice and competition" system which would allow the two systems to compete for

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75. Little Rock School Dist. v. Pulaski County Special School Dist., 726 F. Supp. 1544 (E.D. Ark. 1989).
76. *Id.* at 1553.
77. Liddell v. Board of Educ., City of St. Louis, 696 F. Supp. 444 (E.D. Mo. 1988), *aff'd*, 907 F.2d 823 (8th Cir. 1990).
78. Liddell v. Board of Educ., City of St. Louis, 733 F. Supp. 1324 (E.D. Mo. 1990).

students. The court would retain control over the racial balance in the two systems, and expressed its willingness to modify the plan, which it admitted might require fine tuning.

Segregated schools in Charleston County, South Carolina and the role of the state in maintaining them were the subjects of a new case brought by the federal government.[79] In 1967, the South Carolina legislature enacted legislation that consolidated the eight separate school systems in the county into a single system, except that control of teacher and student assignments was retained by the old systems. The legislation had the effect of redistributing economic resources among the former districts, some of which were poor while others had greater tax revenues. The legislation also resulted in the perpetuation of several mostly black districts, to which the plaintiffs objected by claiming that their equal protection rights had been violated.

The district court concluded that the failure to include student assignment in the legislation did have a "slightly segregative effect," but that the legislature had no affirmative duty to redraw district lines that had been in effect since before the *Brown v. Board of Education*[80] decision in 1954. It did not follow, the court reasoned, that the positive step of achieving economic redistribution in the county must necessarily be accompanied by any particular steps to achieve other ends that also would be desirable from the plaintiff's perspective. Holding that the burden of proof was on the plaintiffs, the court found after a lengthy examination of the legislative history of the consolidation act that there was no evidence that racial animus was involved in the decision to exclude student and staff transfers.

Desegregation Plan Oversight

The Supreme Court has never articulated precise standards for lower courts to use when deciding whether a school district that is implementing a court supervised desegregation plan has achieved unitary status and can be relieved from court supervision. In general, courts employ the six factors offered in *Green v. County School Board*,[81] looking at the racial balance of the school system in the areas of student assignment, faculty and staff composition, transportation, facilities, and extracurricular activities. There is no agreement among the circuit courts of appeal, however, on the question of whether a system can be declared unitary on some but not all of the factors. Some courts have held that all six factors must be found to be in racial balance simultaneously, while others have held that areas can be removed from court supervision one at a time.

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79. United States v. Charleston County School Dist., 738 F. Supp. 1513 (D.S.C. 1990).
80. Brown v. Board of Educ., 347 U.S. 483 (1954).
81. Green v. County School Bd., 391 U.S. 430 (1968).

Arguments about unitary status were central to most of the 1990 desegregation plan oversight cases. In the long standing litigation regarding Denver's attempt to achieve desegregation, the Tenth Circuit Court of Appeals upheld district court decisions that unitary status had not been reached.[82] The school district had attempted to argue that it had achieved desegregation, in spite of the recent emergence of three racially identified elementary schools. The appeals court agreed with the district court that the three schools had become segregated as the result of board action. For both courts, the reemergence of segregated schools was sufficient evidence that the board's dedication to desegregation was not sufficiently strong to declare the district unitary. Control over what the appeals court called the "slow and acrimonious" litigation was retained in the district court.

The return of *Brown* was ensured when the Tenth Circuit overturned a district court ruling and allowed the plaintiffs to reopen it.[83] The district court had placed the burden on the plaintiffs to show that current segregation in the Topeka school system was the result of purposeful school board conduct. The Tenth Circuit majority disagreed, holding instead that the defendants were required to show that the effects of past discrimination had dissipated. "After a plaintiff establishes intentional segregation at some point in the past and a current condition of segregation, a defendant then bears the burden of proving that its past acts have eliminated all traces of past intentional segregation to the maximum feasible extent."[84] The appeals court opinion rejected the defendants' argument that some showing of intent was necessary before the school board could again be held liable for segregated schools in Topeka.

The Tenth Circuit majority finding was made in the face of data showing that Topeka's schools had become less segregated in the past decade. These data were down played by the majority, which found that this desegregation had occurred because of forces beyond the board's control and because of the pressure brought on the board by the filing of the lawsuit. In dissent, one of the judges hearing the case disagreed with the majority's finding on burden of proof, arguing that even if the burden argument were correct the case should be remanded to the district court for hearings using the correct legal principles. Instead, the case was remanded for the application of a remedy after the appeals court itself reviewed the facts and reached the conclusion that the board was guilty of failing to eradicate discrimination. The dissent also accused the majority of using "perfect racial balance" as its standard in the case.[85]

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82. Keyes v. School Dist. No. 1, 653 F. Supp. 1536 (D. Colo. 1987) and 670 F. Supp. 1513 (D. Colo. 1987), *aff'd*, 895 F.2d 659 (10th Cir. 1990); *see* The Yearbook of Education Law 1988 at 105.
83. Brown v. Board of Educ., 671 F. Supp. 1290 (D. Kan. 1987), *aff'd in part and rev'd in part*, 892 F.2d 851 (10th Cir. 1989).
84. 892 F.2d 851, 859.
85. *Id.* at 894.

The Fifth Circuit Court of Appeals heard an appeal from a district court finding that the Fort Worth school district had achieved unitary status.[86] The district court had found the district to be "unitary in every respect, except for the existence of a homogeneous student population."[87] Unlike the Topeka school district, Fort Worth schools had become increasingly segregated, with a massive busing program proving ineffective in maintaining racial balance. There were 33,000 fewer white students enrolled in the district in 1984 than were present in 1968. The appeals court held that the district court had not erred in concluding the present segregation was caused by this population shift and not by school board action. At the end of a three-year period, the district court must hold a final hearing before the district is declared unitary.

A Texas district court concluded that the Waco school district had achieved unitary status.[88] The court found that the district had complied fully with desegregation plan requirements. The plaintiffs in the case had sought to have court supervision continue, arguing that higher dropout rates for minority students and lower enrollments of minorities in gifted and talented programs were evidence of continuing discrimination.

Desegregation in Cleveland continued at a snail's pace, with a district court observing that it had waited ten years for the defendants to comply with remedial orders.[89] In spite of public statements that they would comply with court orders, no plan for desegregation has been submitted. The court ordered the district to submit a report by December 1990.

Plaintiffs alleging discrimination in an Austin, Texas elementary school student assignment plan were unsuccessful in reopening a long dormant case when a 1987 Fifth Circuit decision upheld a district court ruling refusing to grant an injunction against the plan.[90] After a more than two-year delay, the district court heard arguments in the assignment plan case.[91] The court used a discriminatory purpose test to review the plan, which ended most busing of students. While the new approach to student assignment had a disparate impact on minority children, creating additional racially identified schools, the court concluded that the plan should stand because of the lack of convincing evidence as to the board's intent to discriminate.

School defendants seeking to avoid further court supervision of desegregation in a Delaware county were unsuccessful in convincing a district court that they should not be ordered to implement a State Board

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86. Flax v. Potts, 915 F.2d 155 (5th Cir. 1990).
87. Flax v. Potts, 725 F. Supp. 322, 330 (N.D. Tex. 1989); *see* The Yearbook of Education Law 1990 at 93.
88. Arvizu v. Waco Indep. School Dist., 732 F. Supp. 721 (W.D. Tex. 1989).
89. Reed v. Rhodes, 741 F. Supp. 1295 (N.D. Ohio 1990).
90. United States v. Texas Educ. Agency, 671 F. Supp. 484 (W.D. Tex. 1987), *aff'd sub nom.*, United States v. Overton, 834 F.2d 1171 (5th Cir. 1987); *see* The Yearbook of Education Law 1988 at 98-9.
91. Price v. Austin Indep. School Dist., 729 F. Supp. 533 (W.D. Tex. 1990).

of Education student assignment plan.[92] Local defendants in the case had argued that they had complied fully with court orders issued in 1978 and 1981, but the court concluded that it had retained jurisdiction over the case and that the plaintiffs did not need to prove discriminatory intent on the part of the local school officials when seeking modifications and immediate implementation of the proposed assignment plan. The court refused, however, to order the plan into effect for 1990, accepting the argument that the start of the school year was too close to make it effective.

State Court Cases

The Supreme Court of Arkansas heard a case in which school districts brought suit to halt the payment of state funds to meet the obligations of federal court decisions in *Jenkins*, the Little Rock desegregation dispute.[93] The plaintiff's class action claims were on state equal protection grounds, with the districts arguing that the Little Rock payments violated the formulas in the statute. The court held that the compliance with federal court orders by the legislature was a legitimate, if not compelling, state interest and that the state-aid formula could be modified to achieve the required compliance.

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92. Coalition to Save Our Children v. Buchanan, 744 F. Supp. 582 (D. Del. 1990).
93. Magnolia School Dist. No. 14 v. State Bd. of Educ., 799 S.W.2d 791 (Ark. 1990).